

NTSB Order No. EA-3697

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 6th day of October, 1992

Docket SE-10545

5866

Administrator's appeal on the grounds it was late filed on the 52nd day. The motion is denied. As the Administrator's reply demonstrates, the appeal was timely, as the 50th day was a Saturday. See 49 C.F.R. 821.10.²

Respondent also filed a letter-petition (dated August 7, 1990) seeking reopening of the proceeding for the purpose of presenting additional evidence, and has pursued this matter in his appeal, indicating the type of evidence he wishes to add. As the Administrator correctly argues, this avenue is not now available. See 49 C.F.R. 821.49 and 50 (petitions for rehearing for the purpose of introducing new evidence may be filed only after the Board's decision on appeal of the initial decision). Thus, we will not consider those portions of respondent's appeal that urge rehearing for submission of new evidence.³

²This rule, as published in the C.F.R., has a typographical error. (The copy of the rule given to airmen at the conclusion of the hearing is a correct version.) As pertinent, the correct language of the rule is:

The last day of the period so computed to be included unless it is a Saturday, Sunday, or legal holiday for the Board, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.

Thus, if the 50-day due date in a nonemergency appeal falls on a Saturday, Sunday, or legal holiday for the Board, the pleading is due the next workday.

³We would also advise respondent that the standard for reopening based on new evidence is a strict one: he must show that the new matter was not available at the time of the first hearing, and could not have been discovered by the exercise of due diligence prior to that hearing. See, e.g., Administrator v. Chirino, 5 NTSB 1669, 1670 (1987).

In this proceeding, the Administrator charged, and the parties stipulated (Tr. at 11, Joint Exhibit 1), that respondent violated 14 C.F.R. 91.88(c) (now 91.130(c)). This rule requires that two-way radio communication be established with air traffic control in any airport radar service area (ARSA). Respondent violated § 91.88(c) because, unbeknownst to him, on May 2, 1988, an ARSA had been created in an area through which he flew.⁴

As an affirmative defense, respondent argued that he made all reasonable effort to obtain a current chart (that would have advised him of this fact), but was unable to do so. He testified that, on July 25, 1988, he purchased World Aeronautical Charts (WAC), including WAC CG-20, covering the involved area. The version he purchased, however, was the 16th edition. The 17th edition was effective on July 28th, one day before the start of his flight.⁵ He did not return to the place he bought the earlier version after July 25th to try to purchase a current chart. Tr. at 133. He did, however, attempt unsuccessfully to purchase a current CG-20 at stops along the trip (*id.* at 113), and he changed his route to avoid another area for which he could

⁴The new ARSA was created at Springfield, IL on May 2, 1988. Tr. at 45. On August 7, 1988, respondent entered this ARSA when he flew the Milwaukee, WI to St. Louis, MO leg of a cross-country flight. This flight originated in Van Nuys, CA, on July 29, 1988.

⁵The 16th edition states: "This chart will become OBSOLETE FOR USE IN NAVIGATION upon publication of the next edition scheduled for JULY 28, 1988" (emphasis in original). Exhibit R-4.

not locate a chart (id. at 104).

The law judge did not accept respondent's defense, nor do we find that respondent's actions were adequate and reasonable so as to excuse them. The law judge found, based on evidence offered by the Administrator, that respondent was familiar with sectional charts, that a sectional chart of the area would also contain the necessary information, and that its unavailability had not been demonstrated. (A new sectional chart showing the ARSA was effective June 2, 1988, 2 months before the trip. Exhibit A-1.)

The law judge concluded that respondent was negligent. Tr. at 180. The record also shows, but the law judge did not rely on, the fact that respondent, when speaking with the Milwaukee Flight Service Station, did not ask for assistance in light of his obsolete chart. Tr. at 141-142. We find the law judge's decision amply supported in the record. Respondent has offered no basis to overturn it.

Finally, respondent contends that a sanction will serve no purpose, and that there was bias in the FAA's pursuit of the action against him because he was not from the area. This latter claim is a question of fact, and was not raised by respondent at the hearing. More importantly, it is not supported by evidence or testimony from the hearing, and respondent offers no evidence to support it now.

As the law judge explained to respondent at the hearing, it is not the law judge's role (nor is it ours) to evaluate internal

FAA enforcement policy. Administrator v. Connaire, NTSB Order EA-2716 (1988), affd Connaire v. Secretary, 887 F.2d 723 (6th Cir 1989) (Board's role not to evaluate FAA enforcement program). That the FAA may have changed its enforcement policy on this issue over time (as respondent suggested at the hearing) does not, standing alone, justify dismissing the complaint.

Furthermore, respondent has not justified removal of the sanction. See Administrator v. Mohamed, NTSB EA-2834 (1988) at p. 11, and cases cited there (consideration of the impact of the sanction on the individual is directly contrary to established precedent; "the Board believes there is deterrent value when sanctions are imposed even for unintentional violations").

We turn now to the Administrator's appeal, which seeks reinstatement of the original 30-day suspension. Administrator v. Muzquiz, 2 NTSB 1474 (1975), presents the governing standard of review. Where the law judge has affirmed all violations alleged in the Administrator's complaint, a reduction in the sanction requires that the law judge offer clear and compelling reasons. Id. at 1477. Here, the law judge, in reducing the sanction, relied on the inadvertence of the violation, respondent's efforts to obtain the CG-20 chart, and his reputation and past public service.

We cannot find that these are clear and compelling reasons. Neither a respondent's violation-free record nor good attitude justifies reduction of a sanction. Administrator v. Thompson,

NTSB Order EA-3247 (1991), fn. 9. Respondent's public service is equally immaterial.⁶ Mitigating circumstances must be found in the circumstances of the violation itself.

Here, we find none. We are especially troubled in this case with the law judge's action to reduce sanction because the law judge found the respondent to have been negligent, and concluded that the lack of a mid-air collision resulted more from respondent's "good fortune than to proper prior planning." Tr. at 180.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's motion to reject the Administrator's appeal is denied;
2. Respondent's request for rehearing is denied;
3. Respondent's appeal is denied;
4. The Administrator's appeal is granted; and
5. The 30-day suspension of all respondent's airman certificates, including his airline transport pilot certificate, shall begin 30 days from the date of service of this order.⁷

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above

⁶The law judge noted respondent's 1981 suspension for violation of four regulations, but concluded that this was offset by "extensive evidence of his good reputation for being a competent and careful pilot and other evidence of his extensive public service activities in connection with aviation safety." Tr. at 181-182.

⁷For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

opinion and order.